

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK

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4 SECURITIES INVESTOR
5 PROTECTION CORPORATION,
6 Plaintiff,

7 v. Adv. Case No. 08-01789(SMB)

8 BERNARD L. MADOFF
9 INVESTMENT SECURITIES,
10 LLC, ET AL.,
11 Defendant.

12 - - - - - x

13 IRVING H. PICARD, TRUSTEE
14 FOR THE LIQUIDATION OF B,
15 Plaintiff,

16 v. Adv. Case No. 10-05257(SMB)

17 ZRAICK, JR., INDIVIDUALLY
18 AND AS JOINT TENANT, ET AL.,
19 Defendant.

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1 IRVING H. PICARD, TRUSTEE

2 FOR THE LIQUIDATION OF B,

3 Plaintiff,

4 v.

Adv. Case No. 10-04488(SMB)

5 SOUTH FERRY BUILDING COMPANY,

6 Defendant.

7 - - - - - x

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9 U.S. Bankruptcy Court

10 One Bowling Green

11 New York, New York

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13 May 3, 2017

14 10:04 AM

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23 B E F O R E :

24 HON STUART M. BERNSTEIN

25 U.S. BANKRUPTCY JUDGE

1 Hearing re: 08-01789 - Application of Windels Marx Lane &
2 Mittendorf, LLP for Allowance of Interim Compensation for
3 Services Rendered and Reimbursement of Actual and Necessary
4 Expenses Incurred from August 1, 2016 through November 30,
5 2016 for Windels Marx lane & Mittendorf, LLP, Special
6 Counsel, period: 8/1/2016 to 11/30/2016, fee: \$2,374,541.50,
7 expenses: \$15,499.56

8
9 Hearing re: 08-01789 - Application of Trustee And Baker &
10 Hostetler LLP for Allowance of Interim Compensation for
11 Services Rendered and Reimbursement of Actual and Necessary
12 Expenses Incurred from August 1, 2016 through November 30,
13 2016 for Baker & Hostetler, L.L.P., Trustee's Attorney,
14 period: 8/1/2016 to 11/30/2016, fee: \$35,390,309.40,
15 expenses: \$236,780.39

16
17 Hearing re: 08-01789 - Application of Young Conaway
18 Stargatt & Taylor, LLP as Special Counsel to the Trustee for
19 Allowance of Interim Compensation for Services Rendered and
20 Reimbursement of Actual and Necessary Expenses Incurred from
21 August 1, 2016 through November 30, 2016 for Young Conaway
22 Stargatt & Taylor LLP, Special Counsel, period: 8/1/2016 to
23 11/30/2016, fee: \$47,996.10, expenses: \$1,011.68

24
25 Hearing re: 08-01789 - Application of Kelley, Wolter &

1 Scott, Professional Association as Special Counsel to the
2 Trustee for Allowance of Interim Compensation for Services
3 Rendered from August 1, 2016 through November 30, 2016 for
4 Kelley, Wolter & Scott, Professional Association, Special
5 Counsel, period: 8/1/2016 to 11/30/2016, fee: \$4,185.00,
6 expenses: \$0.00

7
8 Hearing re: 08-01789 - Application of Williams, Barristers
9 & Attorneys as Special Counsel to the Trustee for Allowance
10 of Interim Compensation for Services Rendered from August 1,
11 2016 through November 30, 2016 for Williams, Barrister &
12 Attorneys, Special Counsel, period: 8/1/2016 to 11/30/2016,
13 fee: \$277,992.88 , expenses: \$0.00

14
15 Hearing re: 08-01789 - Application of Cochran Allan as
16 Special Counsel to the Trustee for Allowance of Interim
17 Compensation for Services Rendered Incurred from August 1,
18 2016 through November 30, 2016 for Cochran Allan, Special
19 Counsel, period: 8/1/2016 to 11/30/2016, fee: \$5,013.45,
20 expenses: \$0.00

21
22 Hearing re: 08-01789 - Application of UGGC & Associates as
23 Special Counsel to the Trustee for Allowance of Interim
24 Compensation for Services Rendered and Reimbursement of
25 Actual and Necessary Expenses Incurred from August 1, 2016

1 through November 30, 2016 for UGC & Associates, Special
2 Counsel, period: 8/1/2016 to 11/30/2016, fee: \$68,829.74,
3 expenses: \$3,462.80
4

5 Hearing re: 08-01789 - Application of Triay Stagnetto Neish
6 as Special Counsel to the Trustee for Allowance of Interim
7 Compensation for Services Rendered from August 1, 2016
8 through November 30, 2016 for Triay Stagnetto Neish, Special
9 Counsel, period: 8/1/2016 to 11/30/2016, fee: \$851.65,
10 expenses: \$0.00
11

12 Hearing re: 08-01789 - Application Soroker Agmon Nordman as
13 Special Counsel to the Trustee for Allowance of Interim
14 Compensation for Services Rendered and Reimbursement of
15 Actual and Necessary Expenses Incurred from August 1, 2016
16 through November 30, 2016 for Soroker Agmon, Special
17 Counsel, period: 8/1/2016 to 11/30/2016, fee: \$713,757.20,
18 expenses: \$92,102.77
19

20 Hearing re: 08-01789 - Application Schiltz & Schiltz as
21 Special Counsel to the Trustee for Allowance of Interim
22 Compensation for Services Rendered and Reimbursement of
23 Actual and Necessary Expenses Incurred from August 1, 2016
24 through November 30, 2016 for Schiltz & Schiltz, Special
25 Counsel, period: 8/1/2016 to 11/30/2016, fee: \$47,168.20,

1 expenses: \$3,065.93

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3 Hearing re: 08-01789 - Application of SCA Creque as Special
4 Counsel to the Trustee for Allowance of Interim Compensation
5 for Services Rendered and Reimbursement of Actual and
6 Necessary Expenses Incurred from August 1, 2016 through
7 November 30, 2016 for SCA Creque, Special Counsel, period:
8 8/1/2016 to 11/30/2016, fee: \$15,510.00, expenses: \$0.00

9

10 Hearing re: 08-01789 - Application of Interim Professional
11 Compensation Application of Higgs & Johnson (Formerly Higgs
12 Johnson Truman Bodden & Co.) as Special Counsel to the
13 Trustee for Allowance of Interim Compensation for Services
14 Rendered and for Higgs & Johnson, Special Counsel period:
15 8/1/2016 to 11/30/2016, fee: \$4,029.51, expenses: \$89.17

16

17 Hearing re: 08-01789 - Application of Werder Vigano as
18 Special Counsel to the Trustee for Allowance of Interim
19 Compensation for Services Rendered from August 1, 2016
20 through November 30, 2016 for Werder Vigano, Special
21 Counsel, period: 8/1/2016 to 11/30/2016, fee: \$1,878.07,
22 expenses: \$0.00

23

24 Hearing re: 08-01789 - Application of Eugene F. Collins as
25 Special Counsel to the Trustee for Allowance of Interim

1 Compensation for Services Rendered and Reimbursement of
2 Actual and Necessary Expenses for Eugene F. Collins, Special
3 Counsel, period: 8/1/2016 to 11/30/2016, fee: \$4,538.37,
4 expenses: \$1.61

5
6 Hearing re: 08-01789 - Application of Browne Jacobson, LLP
7 as Special Counsel to the Trustee for Allowance of Interim
8 Compensation for Services Rendered and Reimbursement of
9 Actual and Necessary Expenses Incurred from August 1, 2016
10 through November 30, 2016 for Browne Jacobson, Special
11 Counsel, period: 8/1/2016 to 11/30/2016, fee: \$1,045,836.83,
12 expenses: \$79,958.30

13
14 Hearing re: 08-01789 - Application of Graf & Pitkowitz
15 Rechtsanwalte GmbH as Special Counsel to the Trustee for
16 Allowance of Interim Compensation for Services Rendered and
17 Reimbursement of Actual and Necessary Expenses Incurred from
18 August 1, 2016 through November 30, 2016 for Graf &
19 Pitkowitz Rechtsanwalte GmbH, Special Counsel, period:
20 8/1/2016 to 11/30/2016, fee: \$19,739.12, expenses: \$158.30

21
22 Hearing re: 10-05257 - Zraick Defendants Motion for Entry
23 of an Order (I)(A) Extending Time for Rebuttal Expert
24 Disclosures by Twelve Days or (B) in the Alternative,
25 Declaring Defendants Rebuttal Expert Report Timely Served,

1 and (II) Compelling the Production of Documents Concerning
2 Securities Listed on Defendants Customer Statements

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4 Hearing re: 10-04488 - Status Conference re Undisputed
5 Facts Stipulation (also applies to Adv. P. Nos. 10-04350,
6 10-04398, & 10-05110)

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25 Transcribed by: Dawn South

1 A P P E A R A N C E S :

2 BAKER HOSTETLER

3 Attorneys for the Trustee

4 45 Rockefeller Plaza

5 New York, NY 10111

6

7 BY: DAVID J. SHEEHAM, ESQ.

8 KEITH R. MURPHY, ESQ.

9 MAXIMILLIAN S. SHIFRIN, ESQ.

10 IRVIN H. PICARD, ESQ.

11

12 SIPC

13 Attorney for SIPC

14 1667 K. Street, N.W.

15 Suite 1000

16 Washington, D.C. 20006-1620

17

18 BY: KEVIN H. BELL, ESQ.

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1 BAKER MCKENZIE LLP

2 Attorney for South Ferry #2 LP, South Ferry Building
3 Company, James Lowrey, United Congregation Mesora,
4 et al.

5 452 Fifth Avenue
6 New York, NY 10018
7

8 BY: DEBRA A. DANDENEAU, ESQ.
9

10 HUNTON & WILLIAMS LLP

11 Attorney for Defendants
12 200 Park Avenue
13 New York, NY 10166-0091
14

15 BY: ROBERT A. RICH, ESQ.
16

17 WINDELS MARX LANE & MITTENDORF LLP

18 156 West 56th Street
19 New York, 10019
20

21 BY: HOWARD L. SIMON, ESQ.
22
23
24
25

1 P R O C E E D I N G S

2 THE COURT: Please be seated. Madoff.

3 MR. SHEEHAN: Good morning, Your Honor.

4 THE COURT: Good morning.

5 MR. SHEEHAN: David Sheehan from Baker & Hostetler
6 for the trustee in the Bernard L. Madoff Securities
7 liquidation proceeding.

8 This is the thirty-third fee application this
9 morning, Your Honor.

10 THE COURT: And I know Mr. Belcher is going to
11 tell me the day.

12 MR. SHEEHAN: Yeah, I --

13 THE COURT: So don't steal his thunder.

14 MR. SHEEHAN: I was actually thinking about it,
15 but I actually couldn't figure out the days.

16 THE COURT: That's his specialty.

17 MR. SHEEHAN: Yeah. It is indeed. And I want --
18 this doesn't happen here, I want you to know that, so.

19 In any event, the -- as I usually do I'll just
20 kind of talk very briefly as an overview of what's been
21 going on during the reporting period, I may step outside of
22 that because it tends to blend with me as time progresses.

23 For example, this is the recording period that
24 goes through November of last year, that four-month period
25 that started in July, October, November, and -- November I

1 should say. So it doesn't catch or proceed a tee decision,
2 which has been what we've been spending a lot of our time on
3 as Your Honor knows over the last couple months.

4 But prior to that what was really going on is let
5 me cover three areas.

6 One is good faith, which Your Honor is very
7 familiar with and there's lots of activity not only now
8 before Your Honor but before Judge Moss where we have his
9 work and the discovery proceedings. And as a result those
10 cases are moving at pace, but we're down to from over at one
11 point 900 cases we've down 269 cases. As I stand here today
12 we're just shy of \$700 million. So there's still real value
13 there from the trustee's perspective, we are still pushing
14 those cases.

15 THE COURT: What's the 700 million figure?

16 MR. SHEEHAN: The 700 million is the aggregate
17 number there for the --

18 THE COURT: Potential liability?

19 MR. SHEEHAN: Yeah, potential liability in those
20 269 cases.

21 We settle a good many of these, Your Honor. We
22 average about 10- to \$12 million a month, some months are
23 more generous than that, some are somewhat leaner, but the
24 average over the last two to three years has been about
25 \$10 million a month, and we continue to settle cases using

1 the device of mediation with Judge Cyganowski and others
2 that are principally involved in that endeavor.

3 So that consume as lot of time of our good faith
4 team, and then of course the (indiscernible) practice, et
5 cetera, Your Honor is intimately familiar with, so I need
6 not go through that.

7 The other aspect of the case obviously are all the
8 bad faith cases, and prior to the issuance of the ET
9 decision what we were working on was anticipation of the
10 decision, whichever way it went where would we be, because
11 we knew what cases would be affected by extraterritoriality
12 and which wouldn't, so we've been preparing amended
13 complaints where it's appropriate, applications for
14 discovery, and all of those things are now being discussed
15 with our adversaries and hopefully be presented to Your
16 Honor in an orderly fashion over the next several weeks. So
17 that's our hope.

18 As much as we work hard at that sometimes we can't
19 reach agreement on certain things where we need Your Honor's
20 assistance, but I think overall we have a pretty good sense
21 of where we want to go.

22 We have, as you know, 86 of the cases are on
23 appeal, 87 is RBS, RBS is now making its way through the
24 District Court --

25 THE COURT: I saw that.

1 MR. SHEEHAN: -- and we're obviously on top of
2 that as well.

3 In terms of the former proceedings there's three
4 major firms that have been, you know, the principle among
5 them of course is always Browne & Jacobson in England. And
6 the reason for that is several -- or the reasons are
7 several.

8 And that is first of all they are -- have an
9 action pending there, we have always had what we call the
10 protective action just in case we could not bring the action
11 here in the United States, and that action is -- sort of
12 mirrors what we do here, so we've been updating that
13 complaint and working on it all the time, or as they call it
14 their bill of particulars. So that takes a good bit of
15 time.

16 We also have a lot of activity in the islands that
17 since it's in the Commonwealth we reach out to them and get
18 assistance through them. There's been a good deal of
19 activity in the King Gate matter and more so offshore
20 activities including not only discovery but settlement
21 activities and real litigation going on among that group.

22 And then of course there's always the Fairfield
23 case, which is it still active there, actively being
24 litigated and potentially settled, so we're very much
25 involved in that as well. Not only through our settlement

1 with the liquidator but also as an adversary to the
2 (indiscernible) themselves. So that occupies a lot of their
3 time.

4 Then we have the firm in Israel. We are pursuing
5 that very vigorously there and there is active resistance as
6 Your Honor might suspect, but as I've said before this
7 involves approximately \$130 million that went into a charity
8 there and then was spread about among universities and other
9 institutions. One would think well that's charity why would
10 we go there, but it was not placed there that way, it was
11 placed there in sort of an endeavor that was going to take
12 advantage of the intellectual property there, try to harness
13 it and then make money off of it. And as a matter of fact
14 at one point \$700,000 did come back to the charity as a
15 result of one of those arrangements.

16 So it's a very complicated and intricate problem
17 that we have there as being as I say actively litigated, and
18 Surok Argman (ph) is our counsel there, and you'll see that
19 they're substantial as well.

20 And then the last two are in Liechtenstein and in
21 France. There they're ongoing actions that we are not
22 directly participating in, but in France it's a criminal
23 proceeding, we've gained a good deal of knowledge there with
24 regard to other causes of action such as Thema (ph) and
25 somewhat what I would call the bombastic cases, et cetera.

1 And the same thing is true with regard to King Gate as well.

2 So then we go to Liechtenstein. Liechtenstein
3 there's active litigation going on there between Alpha Prime
4 and a number of the others, and as a result of that they've
5 become an active part of your settlement negotiations. And
6 so -- because we are trying to work now with -- well we have
7 always worked with foreign counsel -- but foreign counsel to
8 reach results that as we get closer towards hopefully the
9 end of the case the light becomes clearer to us as to how to
10 resolve it, and I think our adversaries see the same thing.

11 So that sums up the situation (indiscernible)
12 foreign (indiscernible). Overall I'd say that the case is
13 progressing. I know from Your Honor's perspective it must
14 seem like, you know, a long endeavor, but it's been around
15 for over eight years, or as many days as Mr. Bell will now
16 tell us, but I think overall, you know, the work across the
17 board not just by obviously trustee's counsel, who I
18 represent, but all of our other counsel, the first among
19 them of course being Mr. Simon is here today and his firm
20 Windels, that have done a fantastic job for us, as well as
21 all the other counsel that we have as well. You've seen
22 their work and appreciate it as I'm sure as much as we do.

23 So --

24 THE COURT: I have a question which came up in one
25 of the decisions I wrote. Who is the trustee of the

1 individual estate?

2 MR. SHEEHAN: It is in fact the partner of
3 Mr. Simon --

4 THE COURT: So --

5 MR. SHEEHAN: -- Alan Nisselson.

6 THE COURT: -- Nisselson is still a trustee,
7 right?

8 UNIDENTIFIED SPEAKER: Yes, Your Honor.

9 UNIDENTIFIED SPEAKER: Yes, Your Honor.

10 THE COURT: So because many of the pleadings
11 (indiscernible) that they're asserted by Mr. Picard on
12 behalf of the SIPA estate --

13 MR. SHEEHAN: Right.

14 THE COURT: -- and the individual estate of
15 Madoff, and I was just wondering where that standing comes
16 from. Is that from the consent order?

17 UNIDENTIFIED SPEAKER: Yes, Your Honor.

18 THE COURT: So he's the trustee just for the
19 purpose of --

20 UNIDENTIFIED SPEAKER: He's still in place in case
21 there was a need for an individual trustee, but at that --
22 as a consolidated estate it operates --

23 THE COURT: Okay.

24 UNIDENTIFIED SPEAKER: -- through Mr. Picard.

25 MR. SHEEHAN: The -- I feel compelled to share a

1 little history, if I might. Most of what Your Honor is --

2 THE COURT: Well I know --

3 MR. SHEEHAN: Yeah.

4 THE COURT: -- the germ of the consent order.

5 MR. SHEEHAN: All of that. But the idea was --
6 and I think you'll understand it given the fact that it was
7 Judge Lifland involved, is -- who oversaw this at the very
8 beginning -- what happened was is at the very beginning
9 there was an involuntary petition served that resulted in
10 Mr. Nisselson's appointment. At the same time the U.S.
11 Attorney forfeited \$170 million of the assets so there was
12 nothing for Mr. Nisselson to do. And at that point Mr. --
13 Judge Lifland said, well why can't he continue as that
14 individual trustee not likely after some substantive
15 consolidation there would be a role for him, but in the, you
16 know, unlikely event given the fact that Madoff seems to be
17 the case of unintended consequences that we would perhaps be
18 able to use his services. And it resolves only around the
19 estate itself. The -- it does not involve the SIPA
20 proceeding at all, because quite frankly there are no
21 customers in the earlier proceeding. The only customers are
22 in the SIPA case. Because once the transfer took place when
23 he became an LLC there are no customers in the individual,
24 they all became active customers of the LLC.

25 So from that perspective, which is why we sort of

1 went back and forth, and I think to say we mangled the --
2 you know, might as well be open here -- I think we really
3 mangled the reargument of the A&B case when we came back to
4 Your Honor and suggested maybe it really shouldn't -- we
5 shouldn't be cut off there, and our adversaries have now
6 mangled that even further by suggesting it involves
7 interaccount transfers, which I don't think it does, and
8 Your Honor made that plain, so the whole thing is sort of a
9 (indiscernible) at this point. So -- which we'll deal with
10 at some point, but right now I think it's almost irrelevant.
11 You know, in terms of not only SIPA claims but also the
12 individual claims that we might have, so.

13 And one last thing I would report to Your Honor
14 is, is that -- and Ms. Jacobs is not here so I'm not going
15 to report substantively, but I think Your Honor would be
16 interested -- we did go down for two days last week, we had
17 finished the first day, so I won't say anything further
18 then, although I don't think we need anymore, but you will
19 hear about it I'm sure from Ms. Chapin as to whether we need
20 anymore, and we'll make the transcripts available to Your
21 Honor or we ask the Picard counsel to make that, you know,
22 to waive off. There was nearly a mention of Mr. Picard in
23 those two days.

24 THE COURT: Okay.

25 MR. SHEEHAN: Thank you, Your Honor.

1 THE COURT: Thank you.

2 MR. BELL: Good morning, Your Honor.

3 THE COURT: Good morning.

4 MR. BELL: Kevin Bell on behalf of the Securities
5 Investor Protection Corporation.

6 Last Saturday was the 100th day of the presidency
7 of Donald J. Trump, and I found out that there were 1361
8 days remaining. This case began before the presidency of
9 Barack Obama, 3,065 days ago. So just putting that in
10 context it shows how long this effort has been.

11 As I reported in December the trustee still has
12 another 40 percent of the principle belonging to the victims
13 who haven't been fully satisfied to get. These are the
14 people intended by the congressional legislation that was
15 enacted and signed by President Nixon on December 30th,
16 1970.

17 This case is by far four or five -- I think it's
18 almost five times larger than the other 330 SIPA cases that
19 I have worked on a number of them in my 40 -- almost 44
20 years with SIPC, so it's a little challenging.

21 But I am happy to report, you know, as I always
22 do, that I think we're moving forward. When the end is I
23 don't know, I didn't know I'd get to 3,065 when I got
24 involved on December 11, 2008, but I think there were those
25 who did not think we'd get above 10 percent in the biggest

1 financial fraud in this country's history, this Ponzi, self-
2 admitted by Mr. Madoff in the early days to me when I got
3 him to sign the consent. But clearly it's been very
4 beneficial.

5 And Mr. Sheehan articulates the effort of the
6 lawyers, the 15 special counsel of foreign nature, the three
7 or four or five American counsel, three of whom are -- have
8 applications before Your Honor. I put Windels in a special
9 category, they are a special counsel, but they have been
10 around since Judge Lifland suggested and SIPC agreed that we
11 put Humpty Dumpty back together in a certain way, as
12 Mr. Sheehan calls mangled maybe, and Baker Hostetler that's
13 been there for the beginning.

14 Not in this period, but I've just finished reading
15 the ninety-ninth invoice of Baker Hostetler for the month of
16 March, which --

17 THE COURT: Must be fascinating.

18 MR. BELL: -- which will be the subject of the
19 next fee hearing.

20 But clearly SIPC, myself, and the general counsel
21 review each and every entry, when we have comments we let
22 them be known, and as you see, as I always say, in
23 paragraphs 5 of Baker Hostetler's application, you can see
24 the 14.25 percent reduction from their normal charges that
25 have occurred, the 10 percent holdback that we agreed in the

1 beginning, the 10 percent reduction in fees, plus a little
2 more, that is the result of our overview and comments.

3 Windels Marx is slightly higher at paragraph 3 of
4 the SIPC recommendation, it's 15.59.

5 And as my notes show as I've crossed out numbers
6 and write them again, we've been in this range for almost
7 all my appearances before Your Honor. So there's a
8 consistency to the reductions and the overview.

9 Because as the statute charges my corporation, the
10 Securities Investor Protection Corporation, which is
11 oversight from Congress and the SEC, where there's no
12 reasonable expectation of a general estate or SIPC -- and
13 that means SIPC getting paid back over \$2 billion that its
14 advanced for administrative expenses in this case as the
15 second priority, the first one doesn't really count because
16 there's no alimony and others in this case, but clearly
17 there's a responsibility and we exercise that
18 responsibility.

19 And it is with total confidence SIPC has filed its
20 recommendations with the court and it strongly recommends
21 that these -- all these applications be approved by the
22 Court and the trustee pay all the applicants what they are
23 seeking.

24 And you know, I am available for questions if you
25 have, Your Honor, any that you wish to raise.

1 THE COURT: Okay. Thank you.

2 Does anyone else want to be heard in connection
3 with the applications? Let the record reflect there's no
4 response.

5 In light of SIPC's recommendation and the
6 substantial likelihood that there's not going to be 100
7 percent distribution for the customers, I'll approve the
8 applications, you can submit an order.

9 MR. BELL: Thank you, Your Honor.

10 MR. SHEEHAN: Thank you very much, Your Honor.

11 THE COURT: All right. Next I'll do the status
12 conference on the undisputed fact stipulations.

13 MR. MURPHY: Good morning, Your Honor.

14 THE COURT: Good morning.

15 MR. MURPHY: Keith Murphy, Baker Hostetler for the
16 trustee.

17 MS. DANDENEAU: Good morning, Your Honor. Debra
18 Dandeneau from Baker McKenzie. I'm here for the various
19 defendants in this -- the adversary proceedings that are the
20 subject of the status conference.

21 THE COURT: Okay. As I recall the last we were
22 together you were trying to put together a stipulation of
23 facts --

24 MR. MURPHY: That's correct, Your Honor.

25 THE COURT: -- with a view towards moving for

1 summary judgment. If you could put together that
2 stipulation it would make sense.

3 MR. MURPHY: That's correct, Your Honor.

4 We are here on a status conference on four cases.
5 Picard versus South Ferry #2, Picard versus South Ferry
6 Building Company, Picard versus James Lowrey, and Picard
7 versus United Congregations Mesora, all represented by Baker
8 McKenzie.

9 THE COURT: I only have three on my calendar so
10 let me just ask you -- I'll tell you the adversary
11 proceeding numbers I have --

12 MR. MURPHY: Sure.

13 THE COURT: -- if we can do it that way. 4350.

14 MR. MURPHY: Yes.

15 THE COURT: 4387, 5110. What am I missing?

16 MR. MURPHY: I think there may have been some
17 confusion, Your Honor. The other one is also named South
18 Ferry.

19 THE COURT: Oh, I have it separately for some
20 reason.

21 MR. MURPHY: Okay. So we have -- also the one
22 that's missing, Your Honor, is 4488, and that is Picard
23 versus South Ferry Building Company.

24 THE COURT: Oh, okay. Okay.

25 MR. MURPHY: Okay, great.

1 So, Your Honor, we are here on a status conference
2 on that. As you know, as we mentioned, the parties have
3 been working towards a stipulation for purposes of
4 submitting it to the Court for review for potential summary
5 judgment.

6 The parties, we've been working with Baker
7 McKenzie on one of the stipulations, the Picard versus South
8 Ferry Building Company case.

9 I'm happy to report that the attorneys have
10 reached agreement on a set of stipulated facts. Baker
11 McKenzie is reviewing that to get client approval
12 ultimately, and the goal among the parties was to then apply
13 the same stipulation across the other three cases as well
14 and to submit that.

15 There may be some minor differences just given
16 some of the different facts; however, they would be
17 substantially the same.

18 Your Honor, our goal at this point I think we have
19 hopefully finish up the remaining stipulations and hopefully
20 Baker McKenzie can get client sign off such that we would be
21 able to submit the stipulations by next week some time, and
22 then the Court would review them, and if it's satisfied with
23 what we've done the prior order would go into effect and the
24 dates would then be set off of that for, for example,
25 briefing.

1 THE COURT: Okay. So your proposal then is to
2 schedule another conference, which will eventually -- which
3 will I guess will be essentially a status conference on
4 whether it makes sense to move for summary judgment --

5 MR. MURPHY: After your review.

6 THE COURT: -- based upon the stipulated facts.

7 MR. MURPHY: Correct, Your Honor.

8 THE COURT: All right. So want to push it out a
9 month?

10 MR. MURPHY: Yes.

11 THE COURT: All right.

12 MR. MURPHY: Thank you, Your Honor.

13 I will add as well, Your Honor, with respect to
14 other cases in a similar procedural posture, not necessarily
15 with Baker McKenzie, but the goal would be to use the same
16 or substantially similar stipulated facts so there's
17 consistency with the cases going forward for summary
18 judgment, Your Honor.

19 THE COURT: All right.

20 MR. MURPHY: That's our goal.

21 THE COURT: How about Wednesday, June 7th?

22 MR. MURPHY: Yes, Your Honor.

23 THE COURT: 10 o'clock.

24 MR. MURPHY: Thank you, Your Honor.

25 THE COURT: Okay. Thanks very much.

1 MS. DANDENEAU: Thank you, Your Honor. May I be
2 excused?

3 THE COURT: Yes. Thank you.

4 MS. DANDENEAU: Thank you.

5 THE COURT: And last we have Picard v. Zraick.

6 MR. RICH: Good morning, Your Honor.

7 THE COURT: Good morning.

8 MR. RICH: Robert Rich, Hunton & Williams LLP on
9 behalf of defendants Edward A. Zraick, Nancy Zraick,
10 Patricia Deluca, and Karen Rich. This is adversary
11 proceeding number 10-05257.

12 Just hearing the comments from Mr. Sheehan earlier
13 about the remaining cases, 700 million liability -- alleged
14 liability left really puts this case in perspective, 285,000
15 in alleged liability across two separate accounts.

16 I was also surprised to hear Mr. Sheehan's
17 comments about the strategy of using the device of
18 mediation, because of course after the 546(e) decision we
19 specifically suggested perhaps mediation might be helpful in
20 this case, and received in writing a written response from
21 trustee's counsel that they would be looking for the full
22 amount and so did not think any mediations would serve any
23 purpose.

24 All that being said, we're here on a motion for an
25 extension of time, 12 days, for which to serve an expert

1 report that was served 12 days after the deadline.

2 There's been some dispute as to whether Bankruptcy
3 Rule 9006 applies or whether Federal Rule 16 applies. Under
4 either standard the primary focus is whether there's any
5 prejudice to the other side.

6 THE COURT: That's not true. The Second Circuit
7 has said that the most important consideration under 9006 is
8 the reason for the delay.

9 MR. RICH: I was going to use -- say that that was
10 the other primary.

11 THE COURT: Well that's -- according to the Second
12 Circuit in Enron that's the primary issue.

13 MR. RICH: Okay, Your Honor. I don't think
14 there's any --

15 THE COURT: Which I guess is similar to diligence
16 when you get right down to it.

17 MR. RICH: Okay. I don't think there's any
18 dispute on the prejudice issue. I haven't heard any
19 allegations from the trustee that there's any prejudice by
20 the delay, and certainly Mr. Bell's comments about this
21 going on for 13,000 some odd days suggests the same. I'm
22 sure I'll hear otherwise if that's not the case.

23 As far as diligence, the defendants immediately
24 pursued an expert or the potential expert as soon as
25 receiving the report. We received the Dubinski (ph) report

1 on November 17th, 2016, and as I've mentioned in prior
2 hearings, this is a massive report.

3 THE COURT: Can I ask you a question? How long
4 after you received the Kalora (ph) and Greenblatt (ph)
5 reports did you determine that you wouldn't need a rebuttal
6 report for those reports because they weren't experts?

7 MR. RICH: You know, I don't remember exactly,
8 Your Honor, but you know, not -- maybe within a week or so.

9 THE COURT: Okay. The reason I ask is because in
10 your December 16th letter to the Court you were still
11 considering the possibility of a rebuttal report for Kalora
12 and Greenblatt, which based on what you just said sounds
13 like you didn't start looking at these reports until around
14 December 9th.

15 MR. RICH: Well no, we were certainly looking at
16 them. You know, we didn't want to be -- have to make a
17 determination before we were required to. We certainly were
18 looking at them right away, as soon as they were served on
19 us.

20 THE COURT: Okay.

21 MR. RICH: In any case, we've -- as soon as we
22 reviewed the reports we very quickly found -- you know,
23 started working with other defense counsel, there was
24 actually a consultant already looking at the Dubinski
25 report, and the Dubinski report is a massive report, one

1 that according to Mr. Dubinski took over \$30 million and an
2 enormous amount of time to complete. So as you can imagine
3 we knew it would take some time for the analyst to get
4 through it, although certainly urging that it be completed
5 as quickly as possible.

6 When we came to Your Honor with the request to
7 extend the deadline --

8 THE COURT: Were your clients involved in
9 convertible debenture trading?

10 MR. RICH: Yes, Your Honor. These are -- not
11 these clients specifically, but the accounts from which
12 money was transferred into those accounts.

13 So we came to Your Honor requesting an extension
14 to the end of the Madoff deposition. At the time we came
15 into your chambers had not yet received the transcript of
16 the deposition, but I've heard reports of some general ideas
17 what was said that might -- that could have been assistance
18 in expediting the review.

19 THE COURT: So before you read the Madoff
20 deposition you had no reason to believe that you needed an
21 expert rebuttal report?

22 MR. RICH: Well we certainly -- there was a lot of
23 things in the Dubinski report that we thought were
24 potentially objectionable and had some reviewing, it's a
25 massive report. The Madoff deposition just helped focus it.

1 I think there's going to be issues in the future
2 that we're going to want to raise and that, you know, we'll
3 deal with it at that time as to whether we can do it via
4 expert or whether we just have to cross Mr. Dubinski or just
5 put on evidence. But certainly the Madoff deposition
6 brought this specific issue to light and it felt that it's
7 one that if we focused on the convertible bond issue it's
8 something we can get in before the deadline, although
9 ultimately we were 12 days late on that.

10 But in any case, we received the Madoff deposition
11 transcript on January 3rd. Shortly after that while we were
12 still working with that -- hoping that that same consultant
13 would be able to produce a report, especially with the
14 benefit of the Madoff deposition, we then started searching
15 for other potential experts with the specific expertise in
16 the convertible bond field, and even more specific ones that
17 have been involved since early on, because the issues here
18 were how convertible bond trades were reported in the '80s.
19 So that was important.

20 You know, we spoke -- we had a few suggestions
21 internally. We had to make financial arrangements. These
22 are -- you know, these are individual defendants where it
23 was difficult to put the money together. Eventually we
24 spoke with a bond trader at -- I'm not sure I should mention
25 the firm -- but we spoke with a bond trader, he had some

1 suggestions, a few have -- of the suggestions were
2 interested, but couldn't do it for various reasons, their
3 firm wouldn't let them.

4 Before the end of January we spoke with
5 Mr. Finegold (ph), although he wasn't formally engaged until
6 I believe it was the 3rd when we signed the engagement
7 letter and actually got the security deposit over to him.

8 And you know, we had been discussing the issues,
9 the specific issue of the convertible bonds since the end of
10 January, told him about the deadlines.

11 THE COURT: Have you computed -- gone back and
12 looked at the old client statements to figure out what
13 portion of the profits fictitious or otherwise are due to
14 convertible bond trading and what aren't?

15 MR. RICH: In general it looks like all of the
16 statements from around 1992 and 1993 are all convertible
17 bond trades. The statements look very different after that.

18 THE COURT: After '93 or during '93? Because
19 there's an issue in the case when --

20 MR. RICH: Yeah.

21 THE COURT: -- when the Ponzi scheme began, and
22 Madoff testified that he started doing it some time in 1962
23 -- I'm sorry -- 1992.

24 MR. RICH: There are a number of accounts at issue
25 here. There's a number of accounts that transferred to

1 other accounts. So it's not uniform, there's not one set
2 date that applies to all of them. But you know, in general
3 it's around that time period where you see the change
4 between convertible bond trades and what they're calling the
5 split strike strategy.

6 THE COURT: Okay. But so have you gone back and
7 computed what difference it would make in this case?

8 MR. RICH: Well I've -- I haven't gotten through
9 all of the statements yet, I've looked at the trustee's
10 computations of what his declarations provide, but you know,
11 there are a number of assumptions and ways they computed
12 that have never been approved or -- like, for example,
13 they'll take an interaccount transfer where there's one
14 Madoff account to another Madoff account and assume that all
15 the principle was transferred even if it was never withdrawn
16 from the account it was transferred to.

17 THE COURT: Well --

18 MR. RICH: And none of this has ever been
19 addressed. The first time we've ever seen it is in these
20 expert reports.

21 THE COURT: I'm sorry, wasn't that the subject of
22 the interaccount transfer decision? Were you involved in
23 that?

24 MR. RICH: I am, and we have an appeal. We have
25 oral argument next week in the Second Circuit.

1 THE COURT: Okay. But -- well I mean all the
2 trustee did was then he computed what under his approach was
3 the balance in the account and if the transfer exceeded that
4 balance the credit was given just for that balance.
5 Basically it was an investment method applied to the
6 transfer account.

7 MR. RICH: Yeah. Well -- yeah --

8 THE COURT: I don't understand your statement that
9 it's never been approved. It's been considered by this
10 Court, been considered by the District Court.

11 MR. RICH: But here I'm talking about a transfer
12 where there's one Madoff account to two other Madoff
13 accounts.

14 THE COURT: Right.

15 MR. RICH: One just before another. And the
16 assumption is all the principle went first into the other
17 account, all fictitious profit went next regardless of
18 whether either was withdrawn.

19 THE COURT: No. He didn't make that distinction.
20 Just figured out what the balance of the account was,
21 eliminated fictitious profits, and the only thing that could
22 be transferred really is the principle, you can't transfer
23 fictitious profits. And I know he's transferring the
24 bankruptcy sense.

25 Go ahead. I don't understand what your argument

1 is, but --

2 MR. RICH: And you know, there's a lot of other
3 issues that will become important based on how much
4 principle we calculate as of the '92, '93 period.

5 THE COURT: I understand that. I mean I'm looking
6 at the 0020 account in 1997 supposedly \$253,325 was
7 transferred, but all that they transferred was accounted for
8 was \$5,000. So that's -- you know, that's a big difference.

9 MR. RICH: Right. That's correct, Your Honor.

10 THE COURT: I understand what the issue is, I just
11 didn't understand when you said it's never been considered.

12 MR. RICH: There's also the -- you know, the issue
13 -- we're learning that Madoff held a substantial amount of
14 treasury bills and these are the exact securities that
15 appear on our statements, and so you know, we think that
16 that is going to add to our principle calculation. I don't
17 think that's an issue for today, but it's another reason
18 that all this is relevant.

19 So there was some dispute as to whether this was
20 going to be an evidentiary hearing, I'm not sure if you'd
21 like me to proffer the declaration. Trustee counsel has --

22 THE COURT: Well I have your declaration as part
23 of the record.

24 MR. RICH: Okay.

25 THE COURT: Does the trustee want to cross-examine

1 the witness?

2 MR. SHIFRIN: Good morning, Your Honor. Max
3 Shifrin on behalf of the trustee.

4 No, we think that the declaration in and of itself
5 is completely deficient --

6 THE COURT: Okay.

7 MR. SHIFRIN: -- we have no reason to cross-
8 examine.

9 THE COURT: So I have your declaration.

10 MR. SHIFRIN: Thank you, Your Honor.

11 THE COURT: Thank you. Anything else? Thank you.

12 Yes, sir. You know, I'm curious that you told me
13 the last time that none of this makes any difference in this
14 case.

15 MR. SHIFRIN: Right. You're referring to -- good
16 morning again, Your Honor. You're referring to the
17 Greenblatt declaration that we submitted back in August of
18 2016 that basically stated with respect to all the
19 defendants in cases participating in the Madoff deposition
20 if we adjusted or credited the accounts up until 1992 then
21 only three of the cases -- in only three of the cases would
22 the demand amount change.

23 THE COURT: So isn't this one of them?

24 MR. SHIFRIN: No, it's not one of them. That was
25 my whole point.

1 THE COURT: Well I mention that account, the 0020
2 account, which was opened in November of 1986.

3 MR. SHIFRIN: Uh-huh.

4 THE COURT: I assume that there was trading
5 between 1986 and let's just say the middle of 1992 --

6 MR. SHIFRIN: Uh-huh.

7 THE COURT: -- just to pick to date, and that the
8 Ponzi scheme was not in effect until mid-1992 let's say,
9 presumably the trades and the profits before then were
10 legitimate, right?

11 MR. SHIFRIN: Right. And what the declaration
12 concludes is that even if we credit all of that the
13 defendants' accounts, the net equity they were so far under
14 water at that point that it wouldn't effect the two-year
15 demand.

16 THE COURT: Okay. But I'm looking -- you still
17 can't demand more than the amount of the fictitious profits.
18 You're limited to what was transferred in two years.

19 MR. SHIFRIN: That's correct.

20 THE COURT: But you're also limited to fictitious
21 profits. So when I -- in this particular account it appears
22 that an attempt to transfer \$253,325 occurred on July 8th,
23 1997, but the account was only credited with \$5,000.

24 MR. SHIFRIN: Right.

25 THE COURT: So if those prior transactions were

1 legitimate this account should be, you know, \$248,000
2 larger.

3 MR. SHIFRIN: Your Honor, I don't want to
4 mischaracterize what our expert concluded in his
5 declaration, but I would simply refer you to that
6 declaration.

7 THE COURT: I read the declaration.

8 MR. SHIFRIN: Okay.

9 THE COURT: All I'm saying is you told me it
10 didn't make a difference, and I don't understand that if
11 there are legitimate trades that form part of that
12 disallowed --

13 MR. SHIFRIN: Right.

14 THE COURT: -- transfer. So, for example, well
15 let me see, maybe -- well maybe -- okay. I see what you're
16 saying because the two-year transfers were \$180,000 and the
17 fictitious profits might still be in excess of \$180,000. Is
18 that what you're saying?

19 MR. SHIFRIN: Your Honor, I missed part of your
20 question, I'm sorry, but --

21 THE COURT: You're saying the two-year -- I think
22 I understand what you're saying, the two-year transfers were
23 \$180,000 of this particular account.

24 MR. SHIFRIN: Uh-huh.

25 THE COURT: And even if you credited back the 200

1 some odd thousand dollars, assume those dollars to be
2 legitimate profits, the balance of the principle would still
3 be negative 210-.

4 MR. SHIFRIN: That's effectively our position,
5 yes.

6 THE COURT: I understand. Okay.

7 MR. SHIFRIN: And again, the --

8 THE COURT: So why don't you just assume for the
9 purposes of the case --

10 MR. SHIFRIN: Right.

11 THE COURT: -- that, you know, this particular
12 case that the Ponzi scheme began in 1992 and just let's deal
13 with it? Why are we arguing over this?

14 MR. SHIFRIN: The reason we can't do that, Your
15 Honor, is because the trustee has a commitment to the truth
16 and he is reluctant to stipulate to anything that is at odds
17 with the facts.

18 The seconds reason and perhaps more important is
19 there can be unforeseen circumstances or unforeseen --

20 THE COURT: But yesterday I had a motion for
21 summary judgment where I assumed for the purposes of
22 analysis that a former customer could trace his money out of
23 the LMIS into other feeder funds and then back into the
24 LMIS. We're assuming that for the purposes of analysis --

25 MR. SHIFRIN: Uh-huh.

1 THE COURT: -- for a summary judgment motion.

2 MR. SHIFRIN: I think the start date of the fraud
3 is perhaps a bit more of a sensitive, delicate issue with
4 the number of defendants we have, the number of claimants,
5 but we take Your Honor's point as it is and we will consider
6 -- we'll continue considering it, but at this point we're
7 just not ready to make that concession.

8 THE COURT: All right.

9 MR. SHIFRIN: Returning to the issue that's before
10 the Court today. I think there was a lot that opposing
11 counseling stated that requires some response, but just to
12 crystallize what's actually before the Court here, and that
13 is whether in the supplemental declaration that this Court
14 permitted Mr. Rich to submit adequately demonstrates
15 diligence. And I think the answer to that is clearly no.

16 If you look through the declaration, the specific
17 paragraphs that the trustee articulated in its response
18 letter filed last week, there is simply no specifics
19 provided in the declaration. There are no specific steps.
20 There are no specific dates. There was no information or
21 facts on which the Court can conclude that defense counsel
22 acted diligently in an effort to comply with either the
23 original deadline or the extended deadline.

24 And now the important fact we're here to consider,
25 Your Honor, is that defense counsel has had numerous

1 opportunities to do so. He's had -- he failed to make the
2 showing in his initial request for an extension to the
3 trustee in his initial emails or in his initial letters to
4 the Court. He failed to make the showing in his original
5 motion papers. He failed to make the showing in his
6 declaration. And he continues to fail to make the showing
7 in all these unauthorized filings that he's making. His
8 unauthorized reply, his unauthorized letter to the Court,
9 and the latter of which was made with the benefit of the
10 trustee's opposition to the declaration. All he had to do
11 was fill in the holes and he still can't do it.

12 I think at this point we have to conclude that
13 opposing counsel just doesn't have the facts and cannot
14 under oath say that he diligently attempted to comply with
15 the deadline. And that should end the inquiry and that is
16 sufficient to deny this motion once and for all.

17 Everything else here that Mr. Rich just discussed
18 is essentially a side show. I mean this is a very narrow
19 inquiry, and as this Court has stated several times, this
20 was a simple, straightforward motion.

21 Now, Mr. Rich has had numerous chances to make and
22 to adequately make and now he is raising the potential for
23 an evidentiary hearing. You don't need an evidentiary
24 hearing on a motion to extend the scheduling order. You
25 simply have to file a motion, complete with the papers that

1 you need to make your case, and that's it. And I think
2 given the five-month period now we've had since the initial
3 rebuttal deadline and where we are now the trustee has
4 indisputably been prejudiced. The case has already been
5 delayed. Even if you deny the motion here and now he's --
6 we've already been prejudiced by a five-month delay in this
7 case. If you grant the motion it's only going to delay the
8 case further. We're going to have to reopen expert
9 discovery, depose Mr. Rich's expert.

10 THE COURT: Isn't discovery complete in this case?

11 MR. SHIFRIN: Well it is --

12 THE COURT: Other than this issue.

13 MR. SHIFRIN: Yes. But if the Court decides to
14 permit the expert report to be entered to be submitted into
15 the case then we're going to have to depose Mr. Finegold,
16 right? Justice would demand that, and I think that's going
17 to extend the case further. And as Your Honor is aware this
18 case has been proceeding for eight years and delay is truly
19 the Achilles heel for the trustee.

20 That's what all these defendants do constantly,
21 and they're in the business of delaying these cases as much
22 as they can. Mr. Rich has been doing this for the last
23 year. Ms. Shavin (ph), who he's coordinating with
24 closely --

25 THE COURT: So why don't you just withdraw your

1 opposition, take Finegold's deposition, and we'll try the
2 case?

3 MR. SHIFRIN: Because that would basically mean
4 that deadlines don't mean anything in these cases. We have
5 to have some settlements of procedure here. He had a
6 deadline, he failed to meet it. If we permit that to slide
7 then we have hundreds of other cases that we have to treat
8 similarly.

9 THE COURT: There is an underlying theme in your
10 papers that in order to satisfy the diligence requirement
11 you have to say on this day I did this, on this day I did
12 this, on this day I did this. What's the authority for
13 that?

14 MR. SHIFRIN: I think it's -- well the authority
15 is just the definition of the term diligence, right?

16 THE COURT: No, I understand what diligence is,
17 but we're talking about proof of diligence.

18 MR. SHIFRIN: Right.

19 THE COURT: And you know, he's saying during the
20 30 or 60-day period that we're really talking about I did
21 all these things, I didn't tell you what I did on this
22 particular date and I didn't tell you the date I picked up
23 the Dubinski report to read it, but --

24 MR. SHIFRIN: Right.

25 THE COURT: -- you know, it's an 1100 page report,

1 I read it, and these are the things I tried to do, and --

2 MR. SHIFRIN: Right.

3 THE COURT: -- this is what happens. Why does he
4 have to say more than that? That's my question.

5 MR. SHIFRIN: I can address that.

6 The first answer is that without those dates he
7 could have presumably done all those things or most of those
8 things in the week leading up to the deadline. That is
9 fundamentally not diligent. Right? We need those dates to
10 know when he took the specific steps.

11 The second thing, Your Honor, that you just raised
12 which is worth noting is that on the face of the declaration
13 the steps -- the generalized steps that he said he took
14 basically can be boiled down to I needed to read the report,
15 I needed to identify an expert, I needed to figure out cost
16 constraints, and I needed to possibly coordinate with
17 defense counsel. How is that remarkable in any way? This
18 is something that defendants in litigations have to do every
19 single day. None of this is unusual. And if you look at
20 the cases there has to be some sort of -- there has to be
21 more than that.

22 So even if he provided dates the actual reasons
23 for the delay are just on their face not satisfactory for an
24 extension.

25 And the other thing, Your Honor, is that the

1 declaration is ripe with inconsistencies. So just now
2 Mr. Rich was saying that he needed time to read the report
3 because the Dubinski report was so long. If you look at the
4 December 16th letter, which you yourself just cited earlier,
5 there's no reference of that. There's no -- that's not the
6 reason -- that wasn't the reason for the initial request for
7 an extension. He said in his letter and to the -- and in
8 the email to the trustee that he was considering the
9 retention of an expert and he was considering coordinating
10 with opposing counsel. There was nothing about the length
11 of the report, there was nothing about the forthcoming
12 Madoff deposition. All of these reasons were invented on
13 the fly, and his reasons have changed several times.

14 Now he just stated, and this is clear from the
15 declaration as well, that he didn't identify Mr. Finegold --
16 excuse me -- until the end of January. The extended
17 deadline was February 2nd, and he also just said that he
18 retained Mr. Finegold on February 3rd. If you recall at the
19 December 29th chamber's conference he stated that he already
20 had somebody who was reviewing the Dubinski report. Now it
21 turns out that he quote/unquote switched gears after that,
22 started the process from scratch, and didn't identify anyone
23 until the end of January. This is not diligent.

24 And the reasons for starting from scratch, as he
25 put it, are without merit, because he's attempting to say

1 that the Madoff deposition and Madoff's focus on convertible
2 R and all that stuff made him realize that he should focus
3 on that, but he knew that his position was pre '92, there
4 were no real -- there was real trading going on, and pre '92
5 everyone knows that Madoff was engaged in convertible R. He
6 had everything he needed at the time to focus his inquiry on
7 the convertible R strategy. Nothing in Madoff's testimony
8 gave him anything new.

9 All of this is just I think smoke and mirrors,
10 he's throwing everything on the wall to see what can stick,
11 and there's no coherence to his story, and there's clearly
12 no evidence of diligence, and I think under the case law and
13 under the rule the motion must be denied.

14 THE COURT: Thank you. Anything further?

15 MR. RICH: Yeah, please.

16 THE COURT: Can I ask you a question, Mr. Rich?

17 Do you maintain contemporaneous time records in this case?

18 MR. RICH: It's a non-billable case, you know, I'm
19 not sure. I don't --

20 THE COURT: You don't know if you maintain --

21 MR. RICH: I keep time records, I don't keep them
22 like I do, I bill it from there.

23 THE COURT: So your records would reflect when you
24 spoke to somebody, right? When you're --

25 MR. RICH: Can dig up some dates? I could

1 certainly dig up some dates.

2 THE COURT: This is it, you know, you've had a lot
3 of chances. I'm going to decide the motion based on the
4 record, but I was just --

5 MR. RICH: Your Honor, trustee's counsel said they
6 don't know what the word immediately means. It means I
7 immediately started searching for a consultant. I had -- we
8 had one reviewing the Dubinski report within, I mean I don't
9 know exactly, within a couple weeks of getting served,
10 certainly before the conference because we talked about it
11 at the chamber's conference.

12 THE COURT: The chamber's conference was almost a
13 month after you got the Dubinski -- about four weeks after
14 you got the Dubinski report.

15 MR. RICH: Right.

16 THE COURT: And one of the points made is in your
17 letter of December 16th you didn't mention the length of the
18 Dubinski report as a reason for needing additional time.

19 MR. RICH: Well I didn't mean it for the length as
20 far as me needing time, but for an expert to review the
21 whole Dubinski report.

22 THE COURT: You didn't say that in the letter
23 though.

24 MR. RICH: I'm not sure if I said it in the letter
25 or maybe I said it at the conference, I'm sure I did. I

1 mean I think that the length of the Dubinski report was
2 always an issue. I don't think that's inconsistent just
3 because I didn't have that in the letter requesting a
4 chamber's conference.

5 MR. SHIFRIN: Your Honor, if I can just address
6 that one point. Excuse me.

7 THE COURT: Well let him finish --

8 MR. SHIFRIN: Sorry.

9 THE COURT: -- then I'll hear you --

10 MR. SHIFRIN: Sure.

11 THE COURT: -- on that one point.

12 MR. RICH: And this whole bit about prejudice and
13 the fact that this has been delayed, and first of all expert
14 discovery is not closed. I've noticed depositions for both
15 of their experts and they've still not given me dates. They
16 said, oh, we're going to give you dates. It's been months.
17 And they're saying this is delaying things? They're
18 delaying things. We wanted this to go to mediation, they
19 said no. We want our expert discovery they haven't given it
20 to me yet. So that -- I mean that's all I have to say about
21 that.

22 You know, trustee's counsel says he need to make
23 some, he used the word unremarkable, I mean I'm not sure I
24 have to make some remarkable efforts. I mean I need to make
25 diligent efforts to find an expert and that's what I've

1 done. And like I said, this only addresses a small point in
2 the Dubinski report. I've -- it's just impossible to
3 address all the things that need to be addressed in the
4 Dubinski report within the amount of time I had. That's
5 something we'll have to deal with and it'll be brought
6 another day.

7 THE COURT: What do you mean?

8 MR. RICH: I mean the Dubinski it doesn't just
9 talk about convertible arbitrage strategy, it --

10 THE COURT: Are you saying now you want to put in
11 another expert report?

12 MR. RICH: Well I'm not sure I'm going to be able
13 to get it in, but I'm certainly going to go on to challenge
14 the opinions in the Dubinski reports that are beyond the
15 arbitrage strategy.

16 THE COURT: You're certainly free to do that on
17 cross-examination I would assume.

18 All right. Thank you. What did you want to say
19 on that last point, the one point?

20 MR. SHIFRIN: Sure. The point I want to make is
21 just to reemphasize that his initial email to us on the eve
22 of the initial deadline was that defendants are still
23 considering whether to retain an expert. That is --

24 THE COURT: What was the date of that email?

25 MR. SHIFRIN: I believe it was December 14th or

1 15th. It's Exhibit H to defendants' motion. That entire
2 email thread is in there and I think it's very illuminating
3 because it reveals what the true motivations are.

4 The other things to consider, Your Honor, is that
5 both requests -- and we made this clear in our briefing and
6 in our letters -- both requests were accompanied by
7 collateral requests. This was never an issue of my expert
8 is reviewing the report, he's in the process of finalizing
9 his report, we need an X number of days. The trustee would
10 have clearly granted such a courtesy, we grant courtesies
11 like that all the time. There was always a collateral
12 request.

13 In the first instance it was we need to first file
14 a motion in limine to preclude the trustee's experts and
15 then we'll deal with the rebuttal expert deadline.

16 The second time it was to submit -- that he wanted
17 to constitute a fraud proceeding so that he can serve more
18 discovery. It was never a good faith request for more time
19 so he could finalize the report. No such request was ever
20 made.

21 THE COURT: Let me just touch on something else.
22 He wants to take the depositions of Kalora and Greenblatt as
23 I understand it.

24 MR. SHIFRIN: Yeah.

25 MR. RICH: Yes, Your Honor.

1 THE COURT: Have they been noticed? And what's
2 the problem with that?

3 MR. SHIFRIN: I can explain that, Your Honor.

4 After the December 29th chamber's conference
5 Mr. Rich left open the possibility that he was going to
6 submit rebuttal experts with respect to Mr. Greenblatt and
7 Ms. Kalora's report, and he refused to tell us whether he
8 would actually disclose those rebuttal experts by the
9 extended deadline.

10 THE COURT: All right. But that's now water under
11 the bridge, he's not going to do that.

12 MR. SHIFRIN: Right. He did notice --

13 THE COURT: So he wants to take their depositions.

14 MR. SHIFRIN: Well he noticed their depositions in
15 January, we said we will give you a date once we know
16 whether you're going to serve rebuttal experts, because we
17 wanted to see the benefit of -- we want to have the benefit
18 of his rebuttal reports before we make our experts
19 available.

20 THE COURT: I understand. But are you ready to
21 give him a date now since he's not going to submit rebuttal
22 reports on Kalora and Greenblatt?

23 MR. SHIFRIN: Your Honor, this was five months
24 ago. Discovery -- expert discovery is closed. He refused
25 to follow up on those notices, he never said --

1 MR. RICH: Your Honor, that's absurd. I told
2 him --

3 THE COURT: Okay.

4 MR. RICH: -- there's not going to be a rebuttal
5 report, and now they're going to claim that my notice is no
6 more good?

7 THE COURT: Look --

8 MR. RICH: I have emails from them saying we're
9 going to send you dates.

10 MR. SHIFRIN: We haven't heard anything since.

11 THE COURT: Arrange for dates for Kalora and
12 Greenblatt. He requested them before the termination of
13 discovery. You said you wanted to wait to see if there were
14 rebuttal reports, maybe that decision was made after the
15 technical close of discovery, but he made the request before
16 and he wants to take their depositions.

17 MR. SHIFRIN: This is the first he's said anything
18 about it since that initial request in January.

19 THE COURT: All right.

20 MR. SHIFRIN: He's clearly trying to pull
21 something.

22 THE COURT: Well just schedule the depositions.

23 MR. SHIFRIN: Okay.

24 MR. RICH: Your Honor, I'm trying to take their
25 depositions.

1 THE COURT: All right. When you hit oil stop
2 drill -- you know, stop drilling, okay?

3 MR. SHIFRIN: Can I say one thing unrelated to
4 this, Your Honor?

5 THE COURT: Unrelated.

6 MR. SHIFRIN: Unrelated. It just came up.

7 I just want to clarify for the record, I think
8 there was some discussion about trading prior to 1992.

9 THE COURT: Right.

10 MR. SHIFRIN: I just want to be clear on the
11 record that is not the trustee's position that there was
12 legitimate trading prior to 1992.

13 THE COURT: I understand that.

14 MR. SHIFRIN: Okay.

15 THE COURT: But my point is --

16 MR. SHIFRIN: I understand, Your Honor.

17 THE COURT: -- and I hate to say it this way, if
18 you had a private client paying you to litigate an issue --
19 a private client would never pay you to litigate an issue
20 that makes absolutely no difference in this particular case.

21 And I understand the argument now, I didn't
22 understand it before, that even if you credit him or his
23 clients with every profitable trade up through the end of
24 1992 it doesn't make a difference because the fictitious
25 profits still exceed the transfers within two years.

1 Let's just try the case. Look at all the time
2 that's been spent on this particular issue that I'm being
3 told doesn't make a difference.

4 And as I've said, the trustee in other cases has
5 assumed for the purposes of argument a particular -- or
6 conceded a particular position for the purposes of argument
7 so we can brush aside some of the issues in these cases,
8 like the case I had yesterday. I just don't understand this
9 approach.

10 MR. SHIFRIN: Thank you, Your Honor.

11 THE COURT: All right. I'll reserve decision on
12 the motion. In the meantime schedule the other two
13 depositions.

14 MR. SHIFRIN: Thank you, Your Honor.

15 THE COURT: Thank you.

16 (Whereupon these proceedings were concluded at 10:56
17 a.m.)

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C E R T I F I C A T I O N

I, Dawn South, certify that the foregoing transcript is a
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DN: cn=Dawn South, o, ou,
email=digital1@veritext.com, c=US
Date: 2017.05.04 11:27:06 -04'00'

Dawn South

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Veritext Legal Solutions

330 Old Country Road

Suite 300

Mineola, NY 11501